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# Effects of armed conflicts on treaties

## Comments and information received from Governments

## I. Introduction

1. At its sixtieth session (2008), the International Law Commission adopted, on first reading, the draft articles on the effects of armed conflicts on treaties.[1] In paragraph 63 of its report, the Commission decided, in accordance with articles 16 to 21 of its Statute, to request the Secretary-General to transmit the draft articles to Governments for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2010. The Secretary-General circulated a note dated 2 December 2008 transmitting the draft articles to Governments, as well as a reminder note dated 15 September 2009. In paragraph 5 of its resolution 63/123, the General Assembly drew the attention of Governments to the importance for the Commission of having their comments and observations on the draft articles.

2. As at 10 March 2010, written replies had been received from Burundi (7 April 2009), China (30 December 2009), Colombia (9 February 2010), Cuba (29 January 2010), Ghana (4 January 2010), Lebanon (6 July 2009), Poland (31 December 2009), Portugal (6 January 2010), Slovakia (31 December 2009), Switzerland (14 January 2010) and the United States of America (1 February 2010). The comments and observations received from those Governments are reproduced in section II, organized thematically, starting with general comments and continuing with comments on specific draft articles.

[1] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), para. 65.

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# II. Comments and information received from Governments

## A. General comments

### Burundi

[Original: French]

1. From the legal standpoint, present-day conflicts have become unstructured conflicts that no longer always conform to the normal and classic rules of armed conflict that were always observed in the practice of war. This new kind of armed conflict involves a number of poorly identified actors, such as militias, members of armed factions who are generally recruited informally and who have no notion of respect for human rights, civilians who themselves become actors in the conflict, ad hoc soldiers, and even mercenaries recruited for a specific situation; and is a situation in which each armed group now makes its laws, to the detriment of the rules that are recognized and embodied in international law. There is reason to wonder whether international texts remain effective and relevant in the light of the change in the nature of conflicts.

2. Despite such difficulties, the Vienna Convention on the Law of Treaties of 1969 remains appropriate in relation to the effects of armed conflicts on treaties. The inclusion of internal conflicts in the scope of the draft articles should be examined in the context of the Vienna Convention. The issue of effects of armed conflicts on treaties forms part of treaty law and must be kept distinct from the law on the use of force.

### China

[Original: Chinese]

The draft articles should strike an appropriate balance between maintaining the continuity and stability of treaty relations and the effect that dealing with armed conflicts has on those relations. The draft articles should be used only to supplement the Vienna Convention on the Law of Treaties and not to change the content of that Convention.

### Ghana

[Original: English]

1. A historical perspective on the desirability of paying attention to a study of the effects of armed conflicts on treaties would suggest that a contemporary study of this subject based on more contemporary practice is worthwhile, considering the number of armed or violent conflicts witnessed in all corners of the world in the post-cold-war era. While it has yet to be established that the many conflicts the world has witnessed have had a dramatic impact on the law of treaties, it seems useful, nonetheless, to address this topic, if only to anticipate, define and refine the rules on the possible effects of exceptional situations of armed conflicts on treaties, focusing on all conceivable aspects, and not just on suspension or termination of treaties by States or on depositary functions.

2. In the light of recent resolutions adopted by the Security Council and the General Assembly aimed at enhancing the protection of civilians in armed conflict,

the Commission may also look at this dimension with appropriate "without prejudice" clauses, in respect of international humanitarian and human rights law, and also the relevant provisions of the Charter of the United Nations concerning the powers of the Security Council. Ghana subscribes to the Martens Clause, enunciated about a century ago, which postulates that populations and belligerents remain under the protection of the "principles of international law ... the laws of humanity and the requirements of the public conscience".

3. Ghana shares a stated policy underlying the study of this topic, which is to ensure security, stability and predictability in treaty relations in order to minimize the negative effects of armed conflicts on treaty obligations. It should also be the aim of the study to ensure a proper balance between strong and weak nations in respect for the rule of law, and to strengthen the Charter of the United Nations in order to facilitate the attainment of some key purposes and objectives of the United Nations, namely development, peace and security, and respect for human rights.

**Lebanon**

[Original: English]

Lebanon agrees to the draft articles on the effects of armed conflicts on treaties, adopted by the International Law Commission at its sixtieth session.

**Poland**

[Original: English]

1. The task with which the Commission has been entrusted should be re-evaluated. It may well be that the efforts of the Commission have proved that the topic "the effects of armed conflicts on treaties" is, after all, not yet ready for codification and progressive development. There is not only a scarcity of information on the contemporary practice of States, but also a profound change in the realm of armed conflicts (as most present-day armed conflicts are not international), making the project even more elusive. Thus, it may well be that the only solution is to put the work on the back burner.

2. In the meantime, the Commission may consider drafting a questionnaire containing a list of well-thought-out and precise questions for States on the project. The questionnaire should be drafted with the view to finding out whether comprehensive and viable regulation of the subject matter is achievable at the present time.

**Portugal**

[Original: English]

1. The point of the topic is to know to what extent the reciprocal confidence between parties regarding the fulfilment of the obligations set out in the treaty would be jeopardized in case of an armed conflict. Thus, the key and only *ratio* of this subject is how to strike the balance between the confidence of the parties, as a prerequisite for compliance with treaties, and the need for legal certainty.

2. While satisfied to see progress being made on the topic, Portugal is of the opinion that there are some important matters that still need to be settled in order to move towards a more mature work.

**Switzerland**

[Original: French]

The present draft articles are of interest to Switzerland not only as a State party to the Geneva Conventions and their Additional Protocols, but also as their depositary. The long-standing position of the international community, generally, to consider armed conflict not as something apart from the law, but as a situation to be ruled by law, was overwhelmingly confirmed by the adoption of the Geneva Conventions in 1949. The preparation of the draft articles is the continuation of that principle.

**United States of America**

[Original: English]

The United States has consistently supported the general approach taken in the draft articles, which preserves the reasonable continuity of treaty obligations during armed conflict and identifies several factors relevant to determining whether a treaty should remain in effect in the event of an armed conflict. Nonetheless, the United States continues to believe that the draft articles require further work and consideration.

## B. Specific comments on the draft articles

### 1. Draft article 1
### Scope

**Burundi**

[Original: French]

It would be desirable to examine the effects on bilateral treaties and on multilateral treaties and to make the distinction between belligerent States and third States in armed conflicts. For treaties concluded provisionally, the scope must be understood to cover the treaties envisaged in article 25 of the Vienna Convention on the Law of Treaties.

**China**

[Original: Chinese]

Having taken note of paragraph (4) of the commentary on this article, China understands the Commission's reasons for limiting the scope of the draft article to treaties between States. At the same time, China is of the view that, with the steadily growing participation of international organizations in international activities, the variety of treaties they are concluding with States is also becoming richer, and such treaties are unavoidably affected by armed conflict (for example, host country agreements involving international organizations and States could give rise to such problems). For this reason, China recommends that, on the second reading, the Commission further consider whether or not to include the effects of armed conflict on treaties involving international organizations.

**Colombia**

[Original: Spanish]

While the provisional application of treaties may be included, Colombia, when ratifying the Vienna Convention on the Law of Treaties, entered a reservation not recognizing the provisional application of treaties.

**Ghana**

[Original: English]

The study of this topic may go beyond a narrow focus on the effects of armed conflicts on treaties in the sense or meaning of the Vienna Convention on the Law of Treaties, relating to treaties between States *stricto sensu*, to include agreements between States and international organizations. The provisions of the African Union Constitutive Act and recent developments during the sixty-fourth session of the General Assembly argue in favour of the importance of a closer study of this topic by the International Law Commission.

**Poland**

[Original: English]

Poland proposes that draft article 1 read "[t]he present draft articles apply to effects of armed conflicts between States in respect of treaties", so that the scope of the draft articles is clearly limited to international armed conflicts between States. The draft articles have their origin in article 73 of the Vienna Convention on the Law of Treaties, which refers to the outbreak of hostilities "between States". The commentary to draft article 1 erroneously suggests that the descriptor "between States" refers to treaties, whereas it obviously refers to hostilities. (See also the comments on draft article 2 below.)

**Portugal**

[Original: English]

1. To enlarge the scope of the topic to situations in which only one party to a treaty participates in an armed conflict and to situations of internal conflict is not the best approach. Those situations are already adequately addressed in the provisions of the Vienna Convention on the Law of Treaties regarding "supervening impossibility of performance" (article 61) and *rebus sic stantibus* (article 62), which cover situations where only one State foresees difficulties complying with a treaty. In an ongoing conflict between parties to a treaty, the issue at stake is the level of trust and confidence necessary for the regular execution of the treaty.

2. The question of the inclusion of treaties concluded by international organizations raises both practical and theoretical issues that are too difficult to be dealt with in the framework of this topic and should be excluded from the scope of the topic.

3. As to the position of third States with regard to the armed conflict, Portugal fully supports the assessment that, as a matter of treaty law, an armed conflict would produce only the consequences generally provided for in the Vienna Convention on the Law of Treaties, for a State not involved in that conflict. Therefore, it has doubts

as to the recommendation of the Working Group on the Effects of Armed Conflicts on Treaties that the draft articles should apply to *all* treaties between States where at least one of the States is a party to an armed conflict.

## 2. Draft article 2
## Use of terms

### Burundi

[Original: French]

It must be acknowledged that it is difficult to distinguish between international and non-international armed conflicts. Present-day armed conflicts have blurred such distinctions and the number of "civil wars" has increased. Many of these civil wars include "external elements", such as varying degrees of support and participation of other States. Non-international armed conflicts can affect the operation of treaties as much as, if not more than, international armed conflicts and for that reason the proposed draft articles should also deal with the effects of such armed conflicts on treaties. There is a need to determine the legal effects on a treaty in situations involving non-State actors, such as militias, members of armed factions, civilians who themselves have become actors in a conflict, ad hoc soldiers or mercenaries recruited for a specific situation.

### China

[Original: Chinese]

China is of the view that the responsibilities towards other States borne by a State within which an armed conflict is ongoing and by a State caught up in an international armed conflict are not exactly alike. In principle, a State does not have the right to claim exemption from its international obligations by reason of an ongoing internal armed conflict, unless that internal armed conflict has deprived that State of the ability to fulfil its treaty obligations. In other words, invoking internal armed conflict does not have the same force as invoking international armed conflict as a reason for a State to terminate or suspend a treaty. Accordingly, China recommends that the Commission further study the issue.

### Colombia

[Original: Spanish]

1. The definition of armed conflict refers to situations that may affect the application of treaties. In other words, an effect or consequence of the conflict is part of the definition, which may cause confusion. The international law of armed conflict does not expressly define "armed conflict"; it allows, however, for the identification of the characteristics of armed conflict and for a distinction between domestic and international armed conflicts. It may be inferred from the scope of the Geneva Conventions of 1949 that "international armed conflict" implies a declared war or any other armed conflict between two or more States, consistent with the definition proposed in paragraph (b), whether or not it is recognized by any of the parties.

2. It would suffice to include these characteristics in the definition contained in the article without mentioning any of the causes. It must be borne in mind that both

the International Court of Justice at The Hague and the Nuremberg and Tokyo Tribunals have established that the law on armed conflict as a whole is part of *jus cogens* — customary international law — and is therefore binding on all members of the civilized international community, even on States that are not signatories to the various Geneva and Hague instruments.

**Cuba**

[Original: Spanish]

Cuba considers that the term "embargo" should be included within the definition of "armed conflict", even if there are no armed operations between the parties. The article should also make reference to non-international as well as international conflicts, bearing in mind that both types of conflict can affect the execution of and compliance with treaties.

**Ghana**

[Original: English]

1. The scope of the study of this topic should cover internal and international conflicts. Article 3 of the protocol of the Economic Community of West African States (ECOWAS) relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, to which Ghana is a State party, stipulates that one of the objectives of the mechanism is to "prevent, manage and resolve internal and inter-State conflicts", thus making no distinction between international and non-international conflicts. In this context, the question of the extent to which an armed conflict affects the nature of the treaty obligations of a fragile or failed State whether or not a country's status as a failed or fragile State was the consequence of either an internal conflict or an international conflict, merits further study. Ghana's experience has been not to retaliate, but to encourage compliance by a conflict-torn neighbouring country that unilaterally decided to waive certain aspects of the provisions of an ECOWAS treaty on free movement of persons, citing financial difficulties and the need to raise revenue to facilitate its recovery.

2. Furthermore, like other agreements of a similar nature, the aforementioned ECOWAS treaty (protocol), which essentially becomes operable in the event of a conflict, would suggest that the Commission may wish to examine and elaborate any specific rules applicable to such categories of treaties in the course of its work.

3. An attempt by the Commission to consider further clarification of the definition of armed conflict will add value to an examination of the legal effects of armed conflicts on treaties. In an apparent attempt to address the problem of definition, the ECOWAS Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security uses the term "Member State in crisis", which "refers both to a Member State experiencing an armed conflict as well as a Member State facing serious and persisting problems or situations of extreme tension which, if left unchecked, could lead to serious humanitarian disaster or threaten peace and security in the sub-region or in any Member State affected by the overthrow or attempted overthrow of a democratically elected government". The question of whether or not a formal declaration of war exists and the duration of the conflict may be taken into account by the Commission in further elucidating the draft articles on the effects of armed conflicts on treaties.

**Poland**

[Original: English]

1. The definition of the term "armed conflict" should make clear that it refers exclusively to international armed conflicts by adding the word "international" before "conflict". Expanding the scope of the draft articles to cover internal armed conflicts is incompatible with the Vienna Convention on the Law of Treaties, which already applies to internal armed conflicts: the State on whose territory the upheaval occurs may take advantage of a whole range of measures, provided for in the Convention, and attempt termination, withdrawal from or suspension of the operation of a treaty. The inclusion of internal armed conflicts in the draft articles would undermine such procedural safeguards adopted in the Convention. (See also the comments on draft article 1 above.)

2. Poland further suggests that there is a need to expand article 2 to cover other terms used in the present draft articles. The document should follow the pattern of the Vienna Conventions of 1978 and 1986. For example, the term "party" is not defined and is used to denote both a State party to the treaty and a State party to the conflict. As a result, the term "third State", meaning not a party, is ambiguous as it could denote either a third State with regard to the treaty (not a party to a treaty), or a third State with regard to the armed conflict (not a party to the conflict). The terms "State party" and "third State" have established meanings. Thus, using the terms with reference to the armed conflict may cause confusion. Some other terms should be used instead, for example: "a State or States in the conflict" or "a hostile State or States" to describe the State involved in an armed conflict, and "a State or States not involved in the conflict" to describe the State now appearing under the designation of a third State outside the conflict, but still a party to the treaty under consideration.

**Portugal**

[Original: English]

Portugal has doubts regarding the inclusion of internal conflicts. An internal conflict, by definition, does not involve more than one State party to a treaty and does not directly affect relations between that State and the other States parties, and accordingly would only activate the provisions of the Vienna Convention on the Law of Treaties concerning suspension or termination of treaties.

**Slovakia**

[Original: English]

The term "armed conflict" should include both international armed conflicts and non-international armed conflicts. The use of the term is consistent with common article 2 of the Geneva Conventions of 1949 and also with article 1 of Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts) and Protocol II (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts).

**Switzerland**

[Original: French]

1. The inclusion of internal armed conflicts must be supported. The experience of past decades has shown that internal armed conflicts can affect a State's ability to fulfil its contractual obligations, at least to the same degree as international armed conflicts. The study by the Secretariat confirmed that view, citing several specific examples from State practice.[2] In addition, many States have expressed that view in the Sixth Committee, as have some members of the International Law Commission.

2. The objections of those States opposed to the inclusion of internal armed conflict in "armed conflict" may be dispelled by the fact that only armed conflicts "which by their nature or extent are likely to affect the application of treaties" (draft article 2 (b)) are relevant. In accordance with that provision, the definition of armed conflict should cover internal armed conflicts, on the understanding that States must only be able to invoke the existence of an internal armed conflict to suspend or terminate a treaty when the conflict in question is of a certain intensity.

3. Moreover, it is important not to set forth, in the draft articles, a narrower definition of armed conflict, excluding internal armed conflict, than the one established in other international legal instruments. It is clearly dangerous to suggest that the concept of "armed conflict", established in the context of international humanitarian law, should be understood differently in the context of treaty law. That poses the risk of confusion if a subsequent document refers to or uses the term "armed conflict". Switzerland therefore welcomes the commentary on draft article 2 (b), which notes that internal armed conflicts are included in the expression "armed conflict", in line with practice in public international law in general.

4. Similarly, the expression "armed operations" could suggest a reference to regular inter-State conflicts, given that the word "operation" is normally used in the context of traditional military strategy and, therefore, in a context of inter-State conflict. Draft article 2 should perhaps be reformulated to avoid that interpretation.

5. The term "state of war" is also open to challenge. As this concept is used in traditional public international law, a state of war exists between States once a formal declaration of war has been made, regardless of actual armed actions. In modern public international law, the concept is clearly outmoded. The use of such an expression is inappropriate in the context of the effects of armed conflicts on treaties.

6. Switzerland believes that "armed conflict" already includes occupations, and so it is not necessary to use "state of war" to cover such cases. It therefore suggests deleting the words "state of war". In the commentary, explicit note could be made of the inclusion of occupations of territory, so as to avoid any misunderstanding.

**United States of America**

[Original: English]

1. The United States reiterates its serious doubts regarding the appropriateness of including a definition of "armed conflict" in draft article 2. It is worth noting that

[2] A/CN.4/550 and Corrs.1 and 2, para. 147 ff.

even treaties directly relating to armed conflict, such as the Geneva Conventions, do not define this term. There is a wide variety of views on this question and such a definition would be more properly addressed in a treaty negotiated between States. If a definition of armed conflict is thought necessary, the one contained in article 2 seems doubtful, in that it is quite different from any contemporary treatment in modern treaties or judicial decisions. Furthermore, the terms "military occupation" and "armed conflict" have distinct meanings in the law of armed conflict and thus should be referred to separately, if at all.

2. A better approach in draft article 2 would be to make clear that armed conflict refers to the set of conflicts covered by common articles 2 and 3 of the 1949 Geneva Conventions (i.e., international and non-international armed conflicts).

### 3. Draft article 3
### Non-automatic termination or suspension

#### Burundi

[Original: French]

Burundi supports the position that the outbreak of an armed conflict does not necessarily terminate or suspend a treaty, although it may hinder its implementation. Therefore, a State exercising its right to self-defence must have the right to suspend the operation of a treaty that would conflict with its right to self-defence. In the area of fighting against impunity, this obligation has not yet been universally accepted by the international community, although it should be, just like obligations relating to other topical issues, such as terrorism, drug trafficking, etc. The question that arises is whether the examination of the matter of the fight against impunity should be addressed within the draft articles. In our opinion, this question should be dealt with, since its aim is to clarify the legal position and to promote the security of legal relations between States by stating, in draft article 3, that the outbreak of an armed conflict does not necessarily terminate or suspend the application of a treaty. That would be one way to compel States to feel bound to extradite or prosecute and try criminals and to eliminate impunity, so as to ensure justice worldwide by denying criminals refuge.

#### China

[Original: Chinese]

The principle in draft article 3 is conducive to maintaining the stability of international relations, and China is of the view that it can be used as a basis for the draft.

#### Colombia

[Original: Spanish]

This article is consistent with the general principles of international law and with the Vienna Convention on the Law of Treaties.

**Ghana**

[Original: English]

The outbreak of armed conflicts should not ipso facto lead to the suspension or termination of treaties.

**Poland**

[Original: English]

Poland applauds the general idea of the continuous existence and operation of treaties in times of armed conflict as consonant with the principle of *pacta sunt servanda* and the need for securing the stability of treaty relations. However, the provision requires clarification. Does it establish a presumption of the continuous existence and operation of treaties, similar to that expressed in article 42 of the Vienna Convention on the Law of Treaties, or does it simply provide that there is no presumption to the contrary? The word "necessarily", which now substitutes the words *per se* used originally by the Special Rapporteur, introduces ambiguity. By adding the word "necessarily", draft article 3 provides that treaties may or may not be automatically terminated or their operation suspended in case of an armed conflict. The question is whether the drafters intended to let treaties come to an end purely through the incidence of the outbreak of an armed conflict or whether express intent on the part of a State or both States involved in the armed conflict is required. If the former, then which categories of treaties may automatically terminate or become suspended?

**Portugal**

[Original: English]

1. Portugal welcomes the article, which contains a general rule of non-termination or suspension and well encapsulates the important principle of the stability of treaty relations. This may be a matter of policy rather than resulting from practice, as recognized by the Special Rapporteur himself in his concluding remarks in the 2008 report. Nevertheless, this is a key idea for Portugal, one that justifies working on a matter that was intentionally excluded from the Vienna Convention on the Law of Treaties.

2. Portugal does not share, however, suggestions made in paragraph 290 of the 2007 report to include additional clauses concerning justified armed conflict under international law, and the compatibility of such armed conflict with the object and purpose of the treaty or with the Charter of the United Nations. The stability of treaties, or their termination or suspension, should not be linked to the legality or illegality of the use of force.

**Switzerland**

[Original: French]

1. Switzerland believes that neither "automatically" nor "necessarily" fully translates the sense of "*ipso facto*". In its opinion, the clarity of this article would be enhanced by reverting to the expression chosen at the time by the Institute of International Law.

2. Furthermore, Switzerland believes that the presumption that treaties remain in effect during armed conflict should be emphasized more explicitly in the title of the article itself by replacing the existing title with "Presumption of continuity".

### 4. Draft article 4
### Indicia of susceptibility to termination, withdrawal or suspension of treaties

#### Burundi

[Original: French]

The intention of the States parties at the time of conclusion of a treaty should be examined when it is necessary to determine whether or not a treaty remains in force.

#### China

[Original: Chinese]

China favours the comprehensive consideration of such factors as the intention of the parties to the treaty, the nature and extent of the armed conflict and the effect of the armed conflict on the treaty when armed conflict occurs, in order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension. China recommends that the Commission find an appropriate way to prevent the current draft from being misconstrued by the reader as an exhaustive list of all factors requiring consideration. China also recommends that the Commission consider listing other important factors requiring consideration, such as the possible results of terminating, withdrawing from or suspending a treaty.

#### Colombia

[Original: Spanish]

The wording is confusing, as "termination" refers to the treaty, while "withdrawal or suspension" refers to the State party. The wording of the first paragraph must be improved and the scope of the provision clarified.

#### Poland

[Original: English]

1. In the view of Poland, it is not clear what situation the provision purports to regulate, nor is it clear who is supposed to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, or when such a determination is to be made. Does the provision seek to guide States in their unilateral actions attempting to put an end to the operation of a treaty, or is it intended to guide courts in assessing ex post facto the legality of such actions undertaken by States during the armed conflict?

2. Article 4 lacks a solid framework within which to operate: the draft articles do not make clear whether a State involved in an armed conflict has a right to unilaterally put an end to its treaty obligations. Draft articles 8 and 11 provide conflicting answers to that question. Until that issue is clarified, draft article 4 remains disconnected, having no clear object and serving no clear purpose.

**Portugal**

[Original: French]

Parties are supposed to conclude treaties in good faith and with the intention to comply with them (*pacta sunt servanda*). It is thus very difficult to assess the parties' intention at the time of the conclusion of the treaty in the case of an outbreak of hostilities. Portugal thus supports the proposal of the Working Group on the Effects of Armed Conflicts on Treaties to leave aside "intention" as the predominant criterion for determining the susceptibility of treaties to termination or suspension. The new criteria in the provision are more appropriate.

**United States of America**

[Original: English]

The United States agrees that the determination as to whether a treaty is susceptible to termination or suspension in the event of an armed conflict is to be made based on the circumstances surrounding the particular treaty and armed conflict, and on articles 31 and 32 of the Vienna Convention on the Law of Treaties.

5. **Draft article 5 and annex**
**Operation of treaties on the basis of implication from their subject matter**

**China**

[Original: Chinese]

While China is of the view that the annex helps States to understand draft article 5 and is useful by virtue of its indicative nature, the treaties listed do not all conform to the conditions cited in draft article 5; moreover, the academic terms used in the list, such as "law-making treaties", have different interpretations in practice. China recommends that the Commission omit the list as an annex to the draft articles but retain information about the listed treaties in the commentary.

**Colombia**

[Original: Spanish]

While it is not feasible to envisage listing the treaties that may continue in operation or implementation, it may be possible, for the sake of greater clarity, to give a few examples of such treaties or of their subject matter.

**Ghana**

[Original: English]

The Commission may also give some thought to the effects of armed conflicts on treaties aimed at bringing a conflict to an end, including the Charter of the United Nations, given its unique status as a post-conflict treaty of a universal nature. The Commission may also explore the effects of armed conflicts on treaties aimed at promoting regional integration.

**Poland**

[Original: English]

In the view of Poland, article 5 is superfluous. Since there exists a general principle of survival of treaties, providing for specific categories of treaties that do not automatically cease their operation at the outbreak of an armed conflict is not needed. Retaining article 5 would be confusing: it may raise doubts as to the solidity of the principle of survival of treaties itself, in effect undermining the principle expressed in draft article 3.

**Portugal**

[Original: English]

Draft article 5 and the annex thereto have an important role in clarifying what kind of treaties cannot be terminated or suspended, thus helping the operativeness of draft article 4. In principle, Portugal supports the chosen method of categorization of treaties and the recommendation by the Working Group on the Effects of Armed Conflicts on Treaties in 2007 to replace "object and purpose" with "subject matter". However, the list should include an express reference to treaties codifying rules of *jus cogens*.

**Switzerland**

[Original: French]

1. Switzerland proposes that draft article 5 and its annex be restructured to consist of two paragraphs and one annex linked to paragraph 1, which would read as follows:

> "1. In the case of treaties the subject matter of which implies that they continue to operate, in whole or in part, during armed conflict, the incidence of an armed conflict will not as such affect their operation. An indicative list of the categories of such treaties is annexed hereto."

2. Paragraph 1 would cover the types of treaties enumerated therein. The current formulation would be retained, with an express reference to the annex, since the annex contains important information about the categories of treaties concerned.

3. In addition, the English formulation "treaties the subject matter of which involves the implication ..." is rather awkward and does not reflect the French formulation ("traités dont le contenu implique ..."). Such formulation should be replaced by "treaties the subject matter of which implies ..." Switzerland also proposes replacing the English formulation "that they continue in operation" with the formulation "that they continue to operate".

4. Switzerland proposes the addition of a paragraph 2 governing the applicability of a second type of treaty:

> "2. Treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict."

5. The protection granted in draft article 5 against termination or suspension of treaties does not appear to be adequate for *all* types of treaties. Among those treaties that imply that they continue to operate, there is one type which is indisputably operative during an armed conflict. The need for absolute protection of these treaties is based on their fundamental significance in view of the aforementioned goals of the international community, and is reflected by their content as well as by relevant doctrine and jurisprudence. However, the present formulation of draft article 5 does not create different levels of protection. The basic treaties of international humanitarian law and human rights (subparas. (a) and (d)) do not enjoy stronger protection against termination or suspension than, for example, treaties relating to international watercourses and related installations and facilities (subpara. (f)). While Switzerland favours retaining an indicative list as an annex linked to paragraph 1, it is essential to stipulate, in paragraph 2 of draft article 5, that certain specific treaties can in no event be terminated, withdrawn or suspended in the event of an armed conflict.

6. As a model for such a paragraph, Switzerland proposes using the 1985 resolution of the Institute of International Law. Article 4 of the resolution stipulates that "[t]he existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides".[3]

7. In our proposal, treaties relating to the protection of the human person, including treaties relating to international humanitarian law, to human rights and to international criminal law, as well as the Charter of the United Nations, remain or become operative in the event of armed conflict.

8. Treaties relating to international humanitarian law (which, in our opinion, do not form a subset of "treaties relating to the law of armed conflict" as suggested in subparagraph (a) of the annex) play a central role in the protection of individuals from the harmful effects of armed conflicts. It is clear from the texts of international humanitarian law instruments that they apply specifically to situations of armed conflict and are intended to govern various aspects of hostilities. Any understanding to the contrary would render such treaties entirely meaningless. Consequently, armed conflicts cannot affect the operation of these specific treaties.

9. Human rights treaties must also enjoy absolute protection. In our view, the operation of human rights treaties in the event of armed conflict does not appear in principle to be called into question. On a number of occasions, the International Court of Justice has affirmed that the protection offered by the International Covenant on Civil and Political Rights does not cease in time of war, except by operation of article 4 of the Covenant, whereby, under certain conditions, States parties may derogate, in time of public emergency, from certain obligations the Covenant imposes. The fact that numerous human rights treaties provide for the possibility of derogating from certain provisions in time of public emergency, including armed conflict, confirms that in principle these treaties remain in operation in the event of armed conflict. The possibility of derogation does not affect the continuation of the operation of a human rights treaty as such, but provides for a means of suspending certain provisions of the treaty in question.[4] The

[3] Institute of International Law, Session of Helsinki, *The Effects of Armed Conflicts on Treaties*, 28 August 1985.

[4] See also the commentary on draft article 5, para. 33.

principle according to which human rights treaties remain in operation in the event of armed conflict has been confirmed by treaty bodies, the General Assembly of the United Nations and the Security Council. Moreover, this principle is supported by numerous commentators in the legal literature. International humanitarian law, particularly article 72 of Protocol I to the Geneva Conventions, as well as the second preambular paragraph of Protocol II, also rely on this principle.

10. At the same time, it must be recognized that such a provision is without prejudice in two regards: first, to the possibility of derogating from certain provisions, as provided for in the derogation clauses of human rights treaties, and second, to the relationship between international humanitarian law and human rights. Indeed, according to doctrine, both fields of law are deemed to be concurrently applicable.

11. In the case of treaties relating to *international criminal law*, the memorandum by the Secretariat cites, among other instruments, the Rome Statute of the International Criminal Court, under the heading of "other treaties dealing with aspects of armed conflict".[3] It is true that a certain number of crimes defined in treaties under international criminal law could also be considered to be governed by human rights law (forbidding torture, for example), as well as international humanitarian law (such as grave breaches of the Geneva Conventions). Such is not the case, however, for all crimes governed by international law. Considering that these instruments protect the fundamental values of the international community, it would be advisable to have a second paragraph that clearly and explicitly guarantees their operation in the event of armed conflict.

12. Finally, Switzerland proposes the inclusion of the Charter of the United Nations. While it is true that draft articles 13 and 14 implicitly recognize the primacy of the Charter and therefore its application, it would be advisable to mention the Charter explicitly in a paragraph defining those treaties that are operative under all circumstances. In addition to identifying the primary purposes of the international community, which were mentioned above, the Charter sets forth the essential rules of *jus ad bellum* within the context of armed conflict. The annex should be amended to read:

"Annex

Indicative list of the categories of treaties referred to in draft article 5, paragraph 1

(a) Treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(b) Multilateral law-making treaties;

(c) Treaties establishing an international organization;

(d) Treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice;

(e) Treaties relating to diplomatic and consular relations."

[3] A/CN.4/550 and Corr.1 and 2, footnote 75.

13. As was stated above, an indicative list relating to paragraph 1 may in principle be useful. That said, the current formulation of the draft annex seems to be too wide-ranging and at the same time too specific to cover the cases that will no doubt arise in the future. It seems to us advisable to delete subparagraphs (a) and (b), which are covered by paragraph 2 of the proposed draft article 5. For the rest, Switzerland proposes the inclusion of the generic categories indicated above; they contain the current categories, which are in some cases too specific. For example, the treaties in present subparagraph (e) relating to the protection of the environment can be subsumed under new subparagraph (b). The fact that existing subparagraphs (f) and (g) form sub-units of the new subparagraph (a) is confirmed in the Commission's commentary.[6] Present subparagraph (j) can be included in new subparagraph (d). Because of the relationship between them, diplomatic and consular treaties can be placed together. In addition, it would in our view be desirable to add to the list the category of treaties establishing an international organization, such as the Rome Statute of the International Criminal Court. As for treaties of friendship, commerce and navigation and analogous agreements concerning private rights, Switzerland does not regard them as necessarily forming part of the categories in draft article 5, paragraph 1.

**United States of America**

[Original: English]

While the United States has some concerns with the effort in the annex to categorize by subject matter treaties that generally would continue in operation during armed conflict, it supports the decision to characterize this list of categories as indicative and non-exhaustive. In particular, it supports the statement in the commentary to article 5 that it may well be that only the subject matter of particular provisions of a treaty in one of these categories may carry the necessary implication of their continuance. For example, treaties of friendship, commerce and navigation often contain provisions regarding bilateral commerce that might need to be suspended during armed conflict between the parties.

## 6. Draft article 6
## Conclusion of treaties during armed conflict

**Colombia**

[Original: Spanish]

It is redundant to mention lawful agreements in paragraph 2. Clearly, States are subject to the norms and principles of international law and, as subjects of international law, their acts must be guided by them.

**Poland**

[Original: English]

Draft article 6 should be deleted. There can be no doubt that involvement in an armed conflict does not and cannot impair the capacity of a State to conclude treaties. The capacity to conclude treaties is a component of State sovereignty and international personality.

[6] Commentary on draft annex to article 5, subparas. (f) and (g), paras. (38) and (45).

**Switzerland**

[Original: French]

Paragraph 2 must be understood as being without prejudice to article 9, given that States cannot legally agree to the termination of a treaty that is *jus cogens*, for example.

7. **Draft article 7**
**Express provisions on the operation of treaties**

**Colombia**

[Original: Spanish]

This provision is logical and is consistent with the *pacta sunt servanda* principle.

**Poland**

[Original: English]

Article 7 should be deleted because it states the obvious, and it is not needed in view of the general principle as embodied in article 3.

**Switzerland**

[Original: French]

It would be more logical to place draft article 7 immediately after article 4, since it is simply a particularly clear case of the application of article 4.

8. **Draft article 8**
**Notification of termination, withdrawal or suspension**

**Poland**

[Original: English]

1. The title of the article is misleading: the notification that is the subject of the article is not of termination, withdrawal or suspension but of the intent of a State to terminate, withdraw from or suspend the operation of a treaty. The difference is crucial. It reflects the idea that a State may not unilaterally terminate, withdraw from or suspend the operation of a treaty as a consequence of its engagement in an armed conflict. What it may do is to invoke the occurrence of an armed conflict as a ground for expressing its intent to terminate, withdraw from or suspend the operation of a treaty. If so, such a notification has no effects on the treaty until the other State so agrees. The only effect the notification has is to inform the other State or States of the relevant intent of the notifying State.

2. And yet, paragraph 3 spells out "the right" of a party to object, as if, without such an objection, the operation of the treaty could be put to an end unilaterally through a notification of intent to do so. The regulation is convoluted and does not provide guidance to States.

## Switzerland

[Original: French]

1. Switzerland agrees with the Commission that draft article 8 is based on article 65 of the Vienna Convention on the Law of Treaties. The title of draft article 8 should be aligned with the title of article 65, so as to simply read "Procedure", especially as draft article 8 deals with the entire procedure of termination, withdrawal or suspension, not solely with notification.

2. Switzerland commends the decision to include a duty of notification as an element supporting the principle of stability pursuant to draft article 3. It nevertheless would have been appropriate to retain in paragraph 2 the phrase indicating that it is "the termination, withdrawal or suspension" which takes effect, with a view to clarifying the constitutive effect of notification.

3. It would be possible, by analogy with article 65, paragraph 2, of the Vienna Convention, to add a provision fixing a time limit for entering an objection. In view of the urgency normally associated with a situation of armed conflict, such a time limit could in our view be shorter than three months. Alternatively, paragraph 2 should specify that termination, suspension and withdrawal shall take effect once the notification has been received, in the absence of a prompt objection by the other party to the treaty.

4. In addition, it is important to mention the duty of notification in draft article 3, which specifies the non-automatic nature of termination or suspension, so as to make it clear that notification is a prerequisite for termination or suspension.

5. Switzerland recalls that the Commission did not wish to include a formulation equivalent to that of article 65, paragraph (4), in draft article 8, considering that "it was unrealistic to seek to impose a peaceful settlement of disputes regime for the termination, withdrawal from or suspension of treaties in the context of armed conflict". Switzerland wonders what the basis for this assessment was, and whether its outcome is really in conformity with the provisions of the draft articles. The Commission's assumption seems to be in contradiction with draft article 5 and the corresponding indicative list contained in the annex, given that, according to subparagraph (1), the incidence of an armed conflict as such will not affect the operation of treaties relating to the settlement of disputes between States by peaceful means, including resort to conciliation, mediation, arbitration and the International Court of Justice, because of the implication that they continue to operate.

6. In our view, rather, the question of whether it is possible in law to impose a peaceful settlement of disputes regime in relation to termination of a treaty, withdrawal of a party or suspension of the application of a treaty in the context of an armed conflict must be determined in the light of the criteria specified by the Commission elsewhere in the draft articles, in particular articles 4, 5 and 7. Draft article 8, paragraph 3, should be reviewed in the light of these considerations so that the draft articles do not affect the right of a party to have recourse to a peaceful settlement of disputes regime in a case where the continued operation of a treaty that makes provision for such a regime is involved pursuant to the above-mentioned draft articles.

United States of America

[Original: English]

Paragraph 2 should be made subject to the proviso: "unless the notice states otherwise", in order to preserve the possibility, for a State wishing to do so, of providing notice in advance of the effective date of termination.

9. Draft article 9
**Obligations imposed by international law independently of a treaty**

Ghana

[Original: English]

While a treaty is rendered ineffective by the occurrence of an armed conflict, it should not necessarily derogate from a State's treaty obligation assumed under pre-existing or prevailing customary rules of international law generally recognized to be binding on all States under international law.

Switzerland

[Original: French]

In the view of Switzerland, it is important to recall this principle in the context of the draft articles. In addition, it is appropriate to mention explicitly in the commentary on this draft article the category of rules of *jus cogens*.

10. Draft article 10
**Separability of treaty provisions**

Colombia

[Original: Spanish]

The meaning of the term "unjust" in paragraph (c) is not clear.

11. Draft article 11
**Loss of the right to terminate, withdraw from or suspend the operation of a treaty**

China

[Original: Chinese]

Draft article 11 could give rise to differing interpretations. China understands that the circumstances resulting in a State's loss of its right to terminate, withdraw from or suspend the operation of a treaty as described in this article arise after the outbreak of armed conflict, otherwise it would conflict with the Commission's original intent in designing it along the lines of article 45 of the Vienna Convention on the Law of Treaties, as well as with the goals of the present draft. The Commission should amend the present text accordingly to clarify the relevant content.

**Colombia**

[Original: Spanish]

Unilateral conduct is, by acquiescence, a source of international law, so paragraph (b) is acceptable.

**Poland**

[Original: English]

Draft article 11 is the only provision which expressly admits that a State engaged in an armed conflict may — as a consequence of the armed conflict — terminate, withdraw from or suspend the operation of a treaty. However, no such right exists under the draft articles. The transposition of article 45 of the Vienna Convention into draft article 11 was done without paying attention to the differences between the Vienna Convention and the draft articles. Article 45 of the Vienna Convention refers to the *right to invoke a ground for* termination, withdrawal from or suspension of a treaty. Article 45 does not refer to the *right to* terminate, withdraw from or suspend a treaty, because under the Vienna Convention no such right exists. The question about the right of a State to terminate, withdraw from or suspend the operation of a treaty must be answered as a matter of principle.

12. **Draft article 12**
**Resumption of suspended treaties**

**Colombia**

[Original: Spanish]

It does not seem appropriate to exclude, from the outset, the possibility that the parties may express their wish to resume the operation of a treaty and that they may agree on such resumption and on the conditions thereof, in exercise of the authority of sovereign States. It is important to read this article in conjunction with article 18 and to consider merging them into a single article.

**Poland**

[Original: English]

The relationship with article 18 is unclear.

**Switzerland**

[Original: French]

Given the relationship and substantive links between draft articles 12 and 18, Switzerland believes that it would be more logical if they were placed one after the other.

13. **Draft article 13**
**Effect of the exercise of the right to individual or collective self-defence on a treaty**

**China**

[Original: Chinese]

China has taken note of a discrepancy in the texts of draft article 13 as contained in documents A/CN.4/L.727/Rev.1 and A/63/10. China understands that the additional formulation about bearing in mind the consequences of aggression in the wording of the former could help reduce the risk that the draft article may be abused, but recommends that the Commission further consider the relationship of the article to draft articles 14 and 15.

**Portugal**

[Original: English]

Portugal considers that the draft articles should be developed on the basis of the law of treaties and not the use of force. Accordingly, the question of self-defence should not be addressed. In an armed conflict, it is usually difficult to ascertain who is the aggressor and who is the victim. The illegality of a use of force does not affect the question whether an armed conflict has an automatic or necessary outcome of suspension or termination.

**Switzerland**

[Original: French]

It seems appropriate to clarify that even a State exercising its right to self-defence remains subject to the provisions of draft article 5, and Switzerland proposes that the draft article be amended accordingly.

**United States of America**

[Original: English]

The United States has concerns that draft article 13 could be misread to suggest that a State acting in self-defence has a general right to suspend treaty provisions that may affect its exercise of self-defence. At a minimum, the commentary should clarify that, to the extent such a right exists, it would be a limited right that does not affect treaty provisions that are designed to apply in armed conflict, in particular the provisions of treaties on international humanitarian law and the regulation of armed conflict such as the Geneva Conventions of 1949.

14. **Draft article 15**
**Prohibition of benefit to an aggressor State**

**Burundi**

[Original: French]

It is worth considering whether, under the Charter of the United Nations, it could be assumed that there is no difference in the legal effects on a treaty between an aggressor State and a State exercising self-defence.

**China**

[Original: Chinese]

China acknowledges the policy considerations of draft article 15. However, if the aggressor State terminates or suspends a treaty in accordance with the provisions of that treaty itself, a conflict arises between the provisions of this article and those of the treaty in question. The draft articles give no indication as to how such a conflict is to be resolved. The Commission should further clarify this issue, as well as that of whether or not to create similar provisions with regard to unlawful use of force other than aggression.

**Colombia**

[Original: Spanish]

It would be worthwhile to specify whether "armed conflict", as referred to in this article, is the result of aggression.

**Portugal**

[Original: English]

Although sharing the opinion that an aggressor State cannot be placed in the same position as the State exercising its right to self-defence for the purposes of asserting the lawfulness of a conduct, Portugal reiterates its firm belief that this topic must remain within the framework of the law of treaties and must avoid dealing with aspects related to the law on the use of force. Portugal is further concerned about the linking of the draft article to particular definitions of aggression.

**Switzerland**

[Original: French]

Switzerland appreciates the importance of this draft article. It wonders, nevertheless, whether it would not be appropriate to broaden the scope of the prohibition on benefiting from termination or suspension of a treaty to situations in which a State resorts to illegal *threat or use of force* within the meaning of article 2, paragraph 4, of the Charter of the United Nations, rather than covering only aggression.

**United States of America**

[Original: English]

Draft article 15 is problematic to the extent that it incorporates the definition of aggression set forth in General Assembly resolution 3314 (XXIX), in which the Assembly recommended that the Security Council, as appropriate, take account of that definition as guidance in determining, in accordance with the Charter of the United Nations, the existence of an act of aggression. By directly incorporating that definition into draft article 15 and specifying the legal consequences that flow from actions falling within the definition, the United States believes that the provision fails to properly recognize the process described in the Charter of the United Nations for making an authoritative determination of aggression, and arguably

leaves to the belligerent State the ability to decide whether it has committed aggression. In addition, this provision may be unnecessarily limited in scope as it does not address circumstances where a State has illicitly used force in a way that does not amount to aggression. The United States recommends that the reference to resolution 3314 (XXIX) be deleted and that the first clause of the article provide as follows: "[a] State committing an act of aggression as determined in accordance with the Charter of the United Nations shall not terminate ...".

15. **Draft article 16**
**Rights and duties arising from the laws of neutrality**

**Switzerland**

[Original: French]

Draft article 16 is of particular importance to Switzerland, which agrees with both its formulation and form as a "without prejudice" clause.

16. **Draft article 17**
**Other cases of termination, withdrawal or suspension**

**Colombia**

[Original: Spanish]

It would suffice to mention in this article that the draft articles are to be understood as being without prejudice to the termination or suspension of, or withdrawal from, treaties that may occur for other reasons within the framework of international law.

**Cuba**

[Original: Spanish]

Cuba considers that definitions should be provided in draft article 17, paragraphs (b) and (d), as to what is understood by "material breach" and "fundamental change of circumstances".

17. **Draft article 18**
**Revival of treaty relations subsequent to an armed conflict**

**Colombia**

[Original: Spanish]

See the comment on draft article 12.

**Poland**

[Original: English]

The relationship with article 12 is unclear.

**Switzerland**

[Original: French]

See the comment on draft article 12.